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The Twilight of the BITs? EU Judicial Proceedings, the Consensual Termination of Intra-EU BITs and Why that Matters for International Law

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INHALTSVERZEICHNIS

A. Introduction*

The days of bilateral investment treaties between EU member states (intra-EU BITs) seem numbered: On 18 June 2015, the European Commission (the Commission) initiated formal infringement proceedings under Article 258 of the Treaty on the Functioning of the European Union (TFEU) against five member states (Austria, the Netherlands, Romania, Slovakia and Sweden) for their failure to terminate their intra-EU BITs. Pilot procedures have been launched against twenty other member states for the same reason.

Some member states have already started to exchange diplomatic notes intended to terminate intra-EU BITs consensually (notably the Czech Republic with Denmark, Estonia, Malta, Ireland, Italy, Slovenia). Indeed, consensual termination of intra-EU BITs is the explicit wish of the Commission, which convened with member states on 1 October 2015 to discuss the termination of all intra-EU BITs.

According to the Commission, intra-EU BITs are incompatible with EU law for a number of reasons that have been discussed extensively before arbitral tribunals and in scholarship.[1] Thus far however, little attention has been paid to two related issues that

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1 *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No 2008-13 [formerly *Eureko B.V. v. The Slovak Republic*], Decision on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para. 217–292; *Binder v. Czech Republic*, UNCITRAL, Award on Jurisdiction, 6 June 2007, para. 59–67; *Eastern Sugar B.V. v. Czech Republic*, SCC Case No 088/2004, Partial Award of 27 March 2007, Final Award of 12 April 2007, para. 119–181*; Electrabel S.A. v. Republic of Hungary*, ICSID Case NoARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.111–5.60; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No ARB/05/20, Award, 11 December 2013, para. 286–341; *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, PCA Case No 2010–17, para. 55–287; further intra-EU investment proceedings include: *Dan Cake S.A. v. Hungary*, ICSID Case No ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015; *InterTrade Holding GmbH v. The Czech Republic*, UNCITRAL, PCA Case No 2009-12, Final Award, 29 May 2012; *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No ARB/03/16, Award of 2 October 2006; *EDF (Services) Limited v. Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009; *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005; *Austrian Airlines v. Slovak Republic*, UNCITRAL, Final Award, 20 October 2009; *HICEE B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No 2009-11, Partial Award, 23 May 2011; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany,* ICSID Case No ARB/09/6 (formerly Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. The Federal Republic of Germany), Award (on agreed terms), 11 March 2011; *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No ARB/12/12, Notice of Arbitration, 31 May 2012; *Georg Nepolsky v. Czech Republic* , UNCITRAL, Award, February 2010 (not public); *Peter Franz Vocklinghaus v. Czech Republic*, Final Award, 19 September 2011; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010; in the literature see for example *Eilmansberger*, 2 CMLR 46 (2009), 383–429; *Tietje*, TDM 10 (2) (2013), 1–24; *Bungenberg/ Hobe*, in: Bungenberg/Griebel/Hobe/Reinisch (eds), International Investment Law, 1602, 1622–1626; *Kleinheisterkamp*, ASA Bulletin 29 (1) (2011), 212–223; *Hindelang*, Legal Issues of Economic Integration 39 (2) (2012), 179–206; *Hindelang*, Yearbook on International Investment Law & Policy 2010–2011, 2012, 217–242; *Reinisch*, Legal Issues of Econom-

go beyond the question of the compatibility of EU law with intra-EU BITs: First, what are the legal consequences of a hypothetical judgment by the Court of Justice of the European Union (CJEU) declaring intra-EU BITs incompatible with EU law? And second, what are the legal consequences of the consensual termination of intra-EU BITs?[2] This paper discusses both of these questions. The first requires a closer examination of the general tenets of EU procedural law; the second raises distinct and unprecedented legal issues because of the so-called survival clause that is contained in most – not only intra-EU – BITs. Survival clauses provide for an additional period of application of the BIT's protective standards for up to 20 years after termination (the survival period); so far, the legal consequences of this clause in the case of concerted state action remain unsettled and raise other contentious issues, such as the nature and the implications of direct investor rights established in BITs.

The issues are manifold but related; a CJEU judgment that declares intra-EU BITs incompatible with EU law is likely to precipitate consensual termination of intra-EU BITs, while a judgment to the contrary will have the opposite effect. Still, consensual termination remains a political option. The issues are of high practical importance, since they have a direct bearing on the state of investment protection within the EU. Pointing beyond the EU context, the consensual termination of BITs in general gives rise to fundamental considerations regarding the effects of joint state action on investor rights and potentially, by inference, on international individual rights more broadly.

This paper (B.) outlines developments regarding intra-EU BITs that preceded the Commission's initiation of infringement proceedings. It then (C.) seeks to identify the possible consequences of a CJEU judgment on intra-EU BITs, and (D.) examines the consensual termination of intra-EU BITs, including the explicit revocation of survival clauses. Finally, it will discuss to what extent investor rights are comparable to human rights and what inferences can be drawn from that comparison (E.).

B. Background: Intra-EU BITs and their Discontents

Since the EU enlargement of 2007, investment disputes on the basis of intra-EU BITs have prompted scrutiny by the Commission.[3] Intra-EU BITS were concluded mainly between 'old' and 'new' Member States during the years after 1989 and before the accession of the latter to the EU. Today, approximately 190 intra-EU BITs exist between 21 EU member states.[4] In recent years, the Commission has intensified its

ic Integration, 39 (2) (2012), 157–177; *von Papp*, Legal Issues of Economic Integration, 42 (4) (2015), 325–356.

2 This question has received recent attention from *Braun*, JWIT 15 (1) (2014), 73, 114 et seq; *Peters*, Jenseits der Menschenrechte, 288 et seq, *Voon/Mitchell/Munro*, 29 ICSID Rev. 2 (2014), 451–473; *Harrison*, 13 JWIT (2012), 928–950; *Kim*, in: Bungenberg/Griebel/Hobe/Reinisch (eds), International Investment Law, 1585, 1599 et seq; *Roberts*, 56 HJIL (2) (2015), 403–409.

3 Cf only European Commission Observations in *European American Investment Bank AG (EURAM) v. Slovak Republic*, UNCITRAL, PCA Case No 2010-17; European Commission amicus curiae brief in *U.S. Steel Global Holdings I B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No 2013-6 (not public, see IAReporter Story).

4 <http://europa.eu/rapid/press-release_IP-15-5198_en.htm> (visited 29 October 2015).

efforts to make these treaties legally ineffective. It has participated as *amicus curiae* in intra-EU investment arbitrations and argued that intra-EU BITs are inapplicable in these proceedings because of the principle of primacy of EU law.

The extent of the Commission's willingness to confront intra-EU investment proceedings can be observed in the renowned *Micula* arbitration. Arguing that enforcement of the award would constitute illegal state aid under Art. 107 TFEU due to the specific circumstances of the case,[5] the Commission sought to prevent the award from being enforced within the EU. In March 2015, the Commission announced that Romania's attempt to disburse the award by setting off tax liabilities breached EU state aid rules. As a consequence, Romania has to recover the relevant amounts.[6] In response, the Micula brothers brought an action before the CJEU to annul the Commission's decision.[7]

While the award in *Micula* is subject to annulment proceedings before the International Centre for Settlement of Investment Disputes (ICSID) initiated by Romania on 18 April 2014, it has already been confirmed by the District Court for the Southern District of New York and converted into a New York Court judgment. To no avail, the Commission intervened in these proceedings as *amicus curiae*. Actual enforcement of the New York Court judgment by the investors might trigger further action by the Commission, possibly under Article 14 of Council Regulation No 659/1999, which regulates the recovery of illegal state aid within the EU.[8]

Meanwhile, tribunals based on intra-EU BITs continue to be established. According to the UNCTAD World Investment Report 2015, intra-EU investment disputes account for 16% of all cases globally and amount to a total of 99 cases. In 2014, 11 intra-EU investment disputes were initiated, which represents a quarter of all new disputes. Approximately half of these cases were brought under the Energy Charter Treaty (ECT) and the remaining ones were brought on the basis of intra-EU BITs.[9] The Micula brothers themselves – steeled or at least undeterred by their previous experience with intra-EU investment proceedings – have initiated a second claim against Romania on the basis of the Romania-Sweden BIT.[10] Further claims have been launched on the basis of the Malta-Austria BIT,[11] the UK-Romania BIT[12] and the ECT.[13] Given these developments and the Commission's continued failure to impress

[5] Generally, enforcement of intra-EU ICSID awards does not constitute state aid: *Tietje/Wackernagel*, JWIT 16 (2) (2015), 205–247; on this issue also *Ortolani*, JIDS 6 (1) (2015), 118–135.

[6] http://europa.eu/rapid/press-release_IP-15-4725_en.htm <visited 29 October 2015).

[7] CJEU, Case T-646/14, Action brought on 2 September 2014 — *Micula a.o. v Commission*, OJ C 439/29, 8 December 2014.

[8] *Lavranos*, Micula vs. (Brussels) Dracula, <http://www.globalinvestmentprotection.com/index.php/micula-vs-brussels-dracula/> (visited 29 October 2015).

[9] UNCTAD, World Investment Report 2015, Geneva 2015, p. 114.

[10] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No ARB/14/29.

[11] *B.V. Belegging-Maatschappij "Far East" v. Republic of Austria*, ICSID Case No ARB/15/32.

[12] *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No ARB/15/31.

[13] *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain*, ICSID Case No ARB/15/1*; STEAG GmbH v. Kingdom of Spain,* ICSID Case No ARB/15/4*; 9REN Holding S.a.r.l v. Kingdom of Spain* ICSID Case No ARB/15/15*; BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Kingdom of Spain*, ICSID Case No ARB/15/16*; Cube*

investment tribunals and foreign courts with *amicus curiae* submissions, the initiation of infringement proceedings consistently features as the last step in the dispute about intra-EU BITs between some member states and the Commission.

C. The Effect of a CJEU Judgment on intra-EU Investment Arbitration

A CJEU reckoning with intra-EU BITs was long overdue. Beyond the infringement proceedings, the CJEU might be required to deal with intra-EU BITs in a preliminary ruling under Article 267 arising from an eventual bid by Slovakia to set aside the award in *Achmea* in German courts.[14] Moreover, any CJEU judgment in the abovementioned action brought by the Micula brothers before the CJEU will have substantial implications for intra-EU investment proceedings in general. From the perspective of investors and investment tribunals, this raises the question of how intra-EU investment arbitration will be affected if the CJEU deems intra-EU BITs to be incompatible with EU law. The main observation in this regard relates to the general legal consequences of CJEU judgments with regard to measures taken by the member states, including international treaties between those states (*inter se* treaties).

I. General Legal Consequences of CJEU Judgments

Infringement proceedings under Article 258 TFEU result in a declaratory judgment.[15] As such, the judgment does not *ipso facto* render a specific BIT invalid. While the BIT remains in force, the Member State concerned "*shall be required to take the necessary measures to comply with the judgment of the Court*" according to Article 260 I TFEU. If the member state fails to do so, a "*lump sum or penalty payment*" may be imposed by the Court under Article 260 II TFEU. This would not be necessary if the judgment rendered the measure invalid *ipso facto*.

Preliminary reference procedures under Article 267 too do not concern the validity of member state measures but the interpretation of the EU treaties. As opposed to measures of the Union itself, which are regulated in Article 267 II TFEU and which

Infrastructure Fund SICAV and others v. Kingdom of Spain, ICSID Case No ARB/15/20*; Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No ARB/15/23*); KS Invest GmbH and TLS Invest GmbH v. Kingdom of Spain,* ICSID Case No ARB/15/25*; Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No ARB/15/34; *E.ON SE, E.ON Finanzanlagen GmbH and E.ON Iberia Holding GmbH v. Kingdom of Spain*, ICSID Case No ARB/15/35; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No ARB/15/36; *Silver Ridge Power BV v. Italian Republic*, ICSID Case No ARB/15/37; *ENERGO-PRO a.s. v. Republic of Bulgaria*, ICSID Case No ARB/15/19; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No ARB/15/38, *Belenergia S.A. v. Italian Republic*, ICSID Case No ARB/15/40; *Case Greentech Energy Systems and Novenergia. v. Italy,* SCC Case; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No ARB/15/42.

[14] https://www.iareporter.com/articles/german-court-sees-no-clash-between-achmea-v-slovakia-arbitral-award-and-eu-law-and-is-unmoved-by-persistent-arguments-of-european-commission/ (visited 29 October 2015).

[15] CJEU, C-126/03, *Commission v. Germany*, 18 November 2004, ECR I-11197, para. 26; *Andersen*, The Enforcement of EU Law, OUP 2012, 55; *Frenz*, Handbuch Europarecht vol. 5, paras. 2518, 3655.

the CJEU can declare invalid, a CJEU judgment with regard to measures of the member states leaves these measures in force. Accordingly, even if intra-EU BITs are declared incompatible with EU law in either of these proceedings, they remain valid international law. While the member states concerned will be under the legal obligation to ensure compliance with EU law, the intra-EU BITs remain in force as legal acts and, as such, as the basis for jurisdiction of investment tribunals.

This situation gives rise to two follow-up questions: First, in what respect are intra-EU investment tribunals bound by the legal findings of the CJEU as to the content of EU law – can they substitute their own interpretation of EU law to that of the CJEU? Second, what are the legal consequences if a tribunal also finds incompatibility or conflict between EU law and intra-EU BITs?

II. The CJEU's Interpretive Authority over EU Law – but not the BIT

So far, tribunals have generally found intra-EU BITs to be compatible with EU law.[16] Given the rather prominent role that the determination of compatibility between intra-EU BITs and EU law plays in all of these cases, a CJEU judgment to the contrary raises the question whether tribunals will still be able to find intra-EU BITs compatible with EU law. The following considerations are material to answering this question: the CJEU's exclusive competence to provide authoritative interpretation of EU law cannot be disputed by tribunals because EU law itself ultimately refers to the CJEU in matters of its interpretation. Accordingly, if a tribunal applies EU law as the law applicable to the dispute, it cannot merely look at a single norm of EU law and apply it as it sees fit. The tribunal has to consider this norm as a part of EU law and, as such, within the context of the CJEU's exclusive competence, and accept the normative content that is given to it by the CJEU. If the CJEU states that a norm providing for X is incompatible with EU law, it is not for the tribunal to hold otherwise.

If, on the other hand, a tribunal considers EU law as a matter of fact, for example because the choice of law clause of the BIT does not provide for EU law as the applicable law, it has to accept that fact in its actual form.[17] This form is ultimately given to a norm of EU law by the CJEU. Accordingly, if the CJEU states that a norm providing for X is incompatible with EU law, any other statement of the tribunal would manipulate the fact brought before it. Consequently, a tribunal cannot substitute its own judgment for that of the CJEU regarding the normative content of EU law.

[16] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No 088/2004, Partial Award, 27 March 2007, para. 168; *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No 2008-13 (formerly Eureko B.V. v. The Slovak Republic), Decision on Jurisdiction, Arbitrability and Suspension, 26 October 2010, paras. 263, 277; see also *Binder v. Czech Republic*, UNCITRAL, Award on Jurisdiction, 6 June 2007, para. 65; recently, the Swiss Supreme Court explicitly relied on a tribunal's finding that the ECT and EU law on state aid were not incompatible and rejected a challenge to the unpublished award in EDF v. Hungary, *Tribunal federal*, Arrêt du 6 octobre 2015, 4A_34/2015, para. 5.3.2.; cf *Reinisch*, Legal Issues of Economic Integration, 39 (2) (2012), 157–177.

[17] PCIJ, *Certain German Interests in Polish Upper Silesia* (Germany v. Poland), ser. A No 7 (1926), 19; *Nollkaemper*, Chinese Journal of International Law 5 (2) (2006), 301–322.

However, the CJEU's status as the ultimate arbiter regarding the interpretation of EU law does not give it the final say regarding the existence of incompatibility or conflict between EU law and a specific intra-EU BIT. While a judgment of the CJEU states that a rule providing for X is incompatible with EU law, it does not say whether a specific BIT actually contains a rule providing for X, nor does the CJEU have exclusive authoritative competence to interpret that BIT. Therefore, the question whether the BIT actually contains a rule providing for X is something a tribunal must determine in specific arbitration proceedings. That means that, ultimately, the tribunal in a concrete case determines whether there is indeed incompatibility or conflict between the BIT and EU law. Of course, if the CJEU finds investor-state dispute settlement (ISDS) as such incompatible with EU law, it will be hard for a tribunal to argue that the BIT does not provide for ISDS and still uphold its jurisdiction. In that case, a tribunal will have to acknowledge a conflict.

III. The Legal Consequences of a Conflict between EU Law and a Specific Intra-EU BIT

If a tribunal acknowledges a conflict between the BIT and EU law, the legal consequences of that conflict depend on the normative relationship between the BIT and EU law. If this relationship is one of two international treaties, incompatibility or a conflict between them has to be resolved by the VCLT's rules of conflict, namely Article 59 I and 30 III VCLT. Without going into detail, that implies that the later treaty prevails at least to the extent of a conflict. Since the later treaty is the Lisbon Treaty, the BIT will either have been terminated under Article 59 I VCLT or been rendered inapplicable to the extent of the conflict under Article 30 III VCLT.[18] If, however, the relationship between the BIT and EU law is one of international law to domestic law, Article 27 VCLT applies. As a consequence, EU law may not be invoked to justify failure to perform the BIT. In that case, it would generally not matter whether or not there is a conflict between the BIT and EU law.[19]

So far, arbitral tribunals have refrained from clearly categorizing EU law for the purposes of investment disputes. The tribunal in *Achmea* opined "*that it can consider and apply EU law […] both as a matter of international and as a matter of German law*".[20] However, when the legal consequences of a conflict have to be determined, a choice will have to be made. EU law cannot apply as both international and domestic law because the legal consequences of each characterization are distinctly different.

The CJEU's own understanding of EU law militates for an analogous application of Article 27 VCLT in the sense that EU law should be treated *like* domestic law from

[18] *Hindelang*, Legal Issues of Economic Integration 39 (2012), 179, 190.

[19] *Tietje/Wackernagel*, JWIT 16 (2) (2015), 205, 208; *Bungenberg/Hobe*, in: Bungenberg/Griebel/Hobe/Reinisch (eds), International Investment Law, 1602, 1622 et seq.

[20] *Achmea [formerly Eureko] B.V. v. The Slovak Republic*, Award on Jurisdiction, para. 263: cf also *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, para. 7.6.6.; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.117 et seq.

an international perspective:[21] According to the CJEU, EU law is a *sui generis* legal order. If this understanding is accepted as such and not substituted by a pre-conceived understanding about the nature of EU law as necessarily either domestic or international, EU law cannot be qualified either as international or as domestic law *stricto sensu*. This is the very meaning of the term *sui generis*. Accordingly, no rule of the VCLT applies directly. Every rule can only apply by analogy or not apply at all. Since the character of EU law – shaped notably by the principles of direct effect and primacy – is much closer to a domestic legal order than to an international one, and since the CJEU effectively established a dualist relationship between EU law and international law in *Kadi*,[22] there are good reasons to treat EU law *like* domestic law from an international perspective. Moreover, the distinct hermeneutics of EU law have little to do with the traditional hermeneutics of international treaties.[23] Advocate General Maduro's Opinion in *Kadi* also described EU law as a "*municipal legal order of transnational dimension*".[24] Treating EU law like domestic law from an international perspective means that incompatibility or conflict between EU law and intra-EU BITs has in principle no legal effects on intra-EU investment arbitration.[25] The single remedy for this incompatibility or conflict would consist in the termination of intra-EU BITs.

D. Consensual Termination of Intra-EU BITs and the Revocation of Survival Clauses

Because of survival clauses contained in most BITs, unilateral termination will not affect the application of intra-EU BITs for the survival period. An example of a typical survival clause can be found in Article 10.3 of the Sweden-Romania BIT. That Article reads: "*In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 9 shall remain in force for a further period of twenty years from that date.*" Therefore, the Commission wants member states to ensure that all legal effects of the BIT cease with immediate effect and to prevent further application of the BIT even in ongoing disputes.[26] A precedent for such steps can be found in the abovementioned termination practice of the Czech Republic. The exchange of notes with Denmark, Estonia, Slovenia, Ireland and Italy

[21] *Tietje*, Beiträge zum Transnationalen Wirtschaftsrecht 104 (2011), 9 et seq; *Tietje/Wackernagel*, JWIT 16 (2) (2015), 204, 214-217.

[22] CJEU, Joined Cases C-402 and 415/05P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Communities and Commission of the European Communities*, ECR I-6351, 3 September 2008, paras. 282, 285, 316, 317; *De Burca*, HILJ 51 (1) (2010), 1, 2 and 23.

[23] *Maduro*, EJLS 1 (1) (2007) 2, 4.

[24] *Opinion of the Advocate General Maduro*, Case C-402/05, [2008] ECR I-6351, para. 21; on this issue comprehensively *Tietje/Wackernagel*, JWIT 16 (2) (2015), 205,214–217.

[25] On the necessity of certain modifications to this statement, *Tietje/Wackernagel*, JWIT 16 (2) (2015), 204, 228–235; *Tietje*, TDM 10 (2) (2013), 1, 21–23; see also *Electrabel S.A. v. Republic of Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para. 4.103 et seq, 4.133., 4.137.

[26] Letter of formal notice to the Swedish government of 18 June 2015, p. 15 (on file with the author).

not only terminates the BIT but also explicitly provides that the survival clause of the BIT shall no longer apply.[27] The exchange of notes with Malta specifies *that "in accordance with Article 12 (3)* [the survival clause, CW]*, any possible acquired rights or legitimate expectations of the Parties, who acted in accordance with the above-mentioned Agreement prior to its revocation, shall be respected within the framework of the EU Acquis*".[28] Arguably, such a clause is meant to ensure that these rights are no longer protected under the Czech Republic-Malta BIT, but shall be afforded the protection of EU law. Member states parties to an intra-EU BIT also have the option to conclude a treaty that states explicitly that the BIT is terminated with immediate effect and that the survival clause is ineffective.[29] Whether these legal strategies will actually lead to the effects desired by the Commission is a question of distinct legal issues under the law of treaties and the law of state responsibility.

I. Consensual Revocation of Survival Clauses and the Law of Treaties

The general provisions in the VCLT on the termination of treaties are Article 54, which governs the legal preconditions of treaty termination, and Article 70, which governs the legal consequences of treaty termination. Under Article 54 (b) VCLT a "*termination of a treaty or the withdrawal of a party may take place: […] (b) at any time by consent of all the parties after consultation with the other contracting States.*" A termination agreement including the revocation of the survival clause is covered by this provision. Regarding the legal consequences of treaty termination, Article 70 VCLT provides that: "*Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.*" In the case of BITs, a survival clause regularly provides that a termination does not immediately release the parties from their BIT obligations upon termination. However, if the parties conclude a termination agreement and revoke the survival clause, they agree that, contrary to the survival clause, the treaty shall be terminated immediately. According to the plain wording of Articles 54 (b) and 70, they seem entirely free to do that. Notably Article 70 I (b) – sometimes erroneously invoked in this context[30] – does not preserve the survival clause because it only relates to rights of the parties to the BIT – which means that it does not protect investors as non-parties – and because Article 70 VCLT explicitly defers to party autonomy.

[27] Cf Embassy of the Czech Republic, Copenhagen, verbal note n. 13/2009, 6 January 2009; Embassy of the Czech Republic, Tallinn, verbal note n. No 08.2-1/1071, 30 September 2009; Embassy of the Czech Republic, Ljubljan, verbal note No 4/2009, 7 January 2009; Embassy of the Czech Republic, Dublin, verbal note No 2/2009, 6 January 2009; Embassy of the Republic of Italy, Prague, verbal note, 2 February <http://www.mfcr.cz/cs/legislativa/dohody-o-podpore-a-ochrane-investic/prehled-platnych-dohod-o-podpore-a-ochra> (visited 29 October 2015. The website is in Czech only. The relevant documents are on file with the author.).

[28] Embassy of the Czech Republic, Rome, verbal note n. 319/2009, 17 March 2009.

[29] *Voon/Mitchell/Munro*, 29 ICSID Rev. 2 (2014), 451, 472 et seq.

[30] *Eastern Sugar v. Czech Republic*, Partial Award, 27 March 2007, para. 176 et seq.

Moreover, according to the International Law Commission's (ILC) Commentary on the VCLT, Article 70 VCLT is in no way concerned with the rights of individuals.[31] Accordingly, it appears that under the VCLT's general provisions regarding termination, a termination agreement between the parties to an intra-EU BIT will in principle bring about the consequences desired by the Commission.

This result would only be different if the termination agreement itself were contrary to the VCLT. In this respect four main considerations come to mind: the general principle of acquired rights (1.), conflict clauses under Article 30 II VCLT (2.), the principle of good faith under Article 26 VCLT (3.) and the protection of third state rights under Article 37 II VCLT (4.).

1. The General Principle of Acquired Rights

The general principle of acquired rights protects patrimonial rights of individuals against unilateral state action.[32] Whether it also applies to international individual rights is unclear.[33] In fact, the survival clause itself has been seen as a conventional expression of the principle of acquired rights.[34] However, the principle is generally considered subject to party autonomy.[35] As *Sik* points out, an understanding of the principle of acquired rights as transcending party autonomy would basically establish it as "*some overriding natural law principle*".[36] This does not mean that such an understanding would be anathema to international law as such. After all, *ius cogens* and certain general principles of law such as *pacta sunt servanda* represent known categories of norms sharing such an overriding character.[37] Such an understanding of the principle of acquired rights would, however, depart from its established understanding and constitute a substantial qualitative change to its traditional conception. Consequently, the principle of acquired rights as traditionally conceived does not preserve the survival clause against the home and the host state acting in concert.[38]

[31] ILC Yearbook, 1966/II, p. 265.

[32] *Ascensio*, in: Corten/Klein (eds) The Vienna Convention on the Law of Treaties, Article 70, para. 21.

[33] Doubtful, *Ascensio,* in: Corten/Klein (eds) The Vienna Convention on the Law of Treaties, Article 70, para. 21, 24.

[34] *Wittich,* in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 70, para. 31; *contra: Ascensio,* in: Corten/Klein (eds) The Vienna Convention on the Law of Treaties, Article 70, para. 22.

[35] *McNair*, The Law of Treaties, p. 532; *Wittich*, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 70, para. 32.

[36] *Sik,* Netherlands International Law Review, 24 (1–2) (1977), 120, 124.

[37] Depending on the principle of *pacta sunt servanda's* foundation: *Schmalenbach,* in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 26, para. 13–23.

[38] cf *Ascensio* in Corten/Klein (eds) The Vienna Convention on the Law of Treaties, Article 70, paras. 22, 24.

2. *Conflict Clauses*

Survival clauses might be seen as stipulations that lend priority to the BIT over any other subsequent conflicting treaty. The VCLT does not regulate these clauses explicitly. Article 30 II VCLT addresses only the subordination of a treaty in respect of a previous treaty – that, however, does not prevent States from agreeing on a clause granting priority to one.[39] Article 103 of the UN Charter, Article 8 of the North Atlantic Charter and Article XIV of the Convention of 25 May 1962 on the Liability of Operators of Nuclear Ships are relevant examples.[40] Although survival clauses do not explicitly address the BIT's relationship to other treaties, they can easily be seen as the expression of the parties' intention to stabilize the legal conditions governing investments and to embed investor rights permanently in international law (i.e. until the end of the survival period). This intention could not be achieved if survival clauses failed to provide for the priority of the BIT over any other subsequent treaty.

However, if the BIT remains international law and does not develop into some other kind of law to which the VCLT does not apply,[41] the VCLT does not prevent states from entering into a subsequent treaty that includes a clause establishing priority over all previous treaties even if the same states have previously agreed to a priority clause over subsequent treaties. A termination agreement providing explicitly for the revocation of the survival clause in a BIT could provide explicitly for this kind of priority clause.[42] A tribunal would be confronted with two mutually exclusive priority clauses, one providing for the priority of the BIT and one providing for the priority of the subsequent termination agreement. In that case, the two priority clauses would offset each other, with the result that the VCLT's normal rules of conflict apply.[43] As a result, the relationship between the termination agreement and the BIT would be regulated by Article 59 VCLT and Article 30 II VCLT. Both treaties relate to the same subject matter in the sense that the BIT stated that the BITs rules shall govern certain investment relations between the respective countries and the termination agreement states that those rules shall no longer govern said relations. The intention of the parties to terminate the BIT is also clear. As it is impossible to comply with both treaties at the same time, the termination agreement as the later treaty will take precedence over the BIT. Comparably, under the conflict rule of Article 30 II VCLT the BIT would be inapplicable to the extent of a conflict with the termination agreement which is to say in its entirety. Accordingly, even interpretation of the survival clause as a priority clause informed by the BIT's object and purpose does not limit the parties' power to terminate that treaty by mutual consent.

[39] *Odendahl*, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 30, para. 17, 19.

[40] Cf *Chinkin*, Third Parties in International Law, 78.

[41] On the role of general international law for the law of investment protection see *Simma/Pulkowski*, in: Bungenberg/Griebel/Hobe/Reinisch (eds) International Investment Law, 361–372.

[42] *Voon/Mitchell/Munro*, 29 ICSID Rev. 2 (2014), 451, 472 et seq.

[43] *Odendahl*, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 30, para. 19.

Judge *Schücking's* separate opinion in the *Oscar Chinn* case would not alter this result. *Schücking* opined that if a multilateral treaty contained a clause prohibiting conflicting treaties such as Article 20 of the Covenant of the League of Nations (the Covenant) and if some parties to the multilateral treaty concluded an *inter-se* treaty conflicting with the former treaty, all other parties could regard the latter treaty as automatically void.[44] The majority remained silent on this subject. However, the case did not concern a situation where a treaty was terminated by all the parties to it. *Schücking's* opinion refers only to the conclusion of an incompatible treaty by some member states, not all. The case would be comparable to the consensual revocation of survival clauses only if all member states to the Covenant entered into an agreement to terminate the Covenant. In that case, the question would become the same as in the present case: Can such a treaty stipulation override the customary principle expressed in Article 54 (b) VCLT that termination of a treaty may take place "at any time by consent of all the parties"? The League's 34 remaining member states' unanimous agreement of 18 April 1946 to dissolve the League answers this question in the affirmative although it did not remain undisputed at the time.[45]

With some relevance for the present problem, it could be argued that since the United Nations had been established, the agreement to dissolve the League was not incompatible with Article 20 of the Covenant and therefore did not prevent the termination agreement from entering into force. Without the UN, a termination agreement regarding the League would have been incompatible with Article 20 of the Covenant and therefore automatically void in *Schücking's* opinion. However, there can only be speculation regarding *Schücking's* decision in that case. Beyond that speculation, such a termination agreement would bring us back to Article 59 VCLT (see above, p. 14). Today, even Article 103 of the UN Charter does not render a subsequent conflicting treaty void, but merely engages the international legal responsibility of the states concerned.[46] Consequently, conceiving a survival clause providing for priority of the BIT does not protect the BIT against concerted state action.

3. The Principle of Good Faith

The same is true for the principle of good faith as incorporated in Article 26 VCLT. According to the ILC commentary, Article 26 VCLT is limited to the relations between the parties. In fact, an earlier version of Article 26, Article 55 of the Waldock draft to the VCLT contained a reference to the rights of third states. How-

[44] PCIJ, *Oscar Chinn* (Great Britain v. Belgium) PCIJ ser. A/B No 63, 12 December 1934 (sep. op. Schücking J.), 65, 149.

[45] Resolution for the Dissolution of the League of Nations, Adopted by the Assembly on April 18, 1946, International Organization 1 (1) (1947), 246–251; ICJ, *International Status of South West Africa* ICJ Reports 1950, 128 (sep. op. Read J.), 164, 167; cf further *MacDonald*, The Fletcher Forum of World Affairs, 2 (2) (1978), 213 et seq.

[46] Cf: *Peters*, Treaty Making Power, MPEPIL, para. 115.

ever, the ILC voted to leave any matters of third party rights to the provisions dealing directly with third party rights.[47]

4. The Protection of Third Party Rights

The provisions regarding third party rights figure in Part III, Section 4 of the VCLT. Article 37 II VCLT contained in this section stipulates that "*2. When a right has arisen for a third State in conformity with article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.*"

Clearly, this provision is not applicable directly because it refers to states. However, if it is true that BITs establish direct rights for investors,[48] an analogous application to investor rights does not seem to be entirely without merit: The VCLT does not explicitly address the issue of individual rights as third party rights; both a state and an individual have a comparable interest in the continued existence of a right granted by an international treaty. On this basis, the possibility of an analogy shall be assumed for the following considerations.[49] Conclusive determination in this respect is beyond the scope of this paper.[50]

Under this assumption, the revocation of survival clauses by mutual agreement is contrary to Article 37 II VCLT in analogous application. On this basis, the question

[47] *Salmon*, in Corten/Klein (eds) The Vienna Convention on the Law of Treaties, Article 26, para. 21.

[48] *Corn Products International Inc v. United Mexican States*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, para. 173; *English Court of Appeal, Occidental Exploration and Production Co. v. Republic of Ecuador, (2005),* EWCA Civ. 1116, No 22; 2 Lloyd's Rep. 707; *BG Group Plc. v. Argentina*, UNCITRAL Arbitration, Award of 24 December 2007, para. 145; a comprehensive analysis is provided by Arbitator Rovine, Concurring Opinion, in *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No ARB (AF)/04/5 (NAFTA), Award of 21 November 2007, para. 17 et seq; *Wintershall AG v. Argentina*, ICSID Case No ARB/04/14, Award, 8 Dec. 2008, at para. 114; on international individual rights in general: ICJ, *LaGrand* (Germany v. US) ICJ Reports 2001, 466, para. 77; *Avena and Other Mexican Nationals* (Mexico v. US) ICJ Reports 2004, paras. 40, 124; *Happ*, Schiedsverfahren zwischen Staaten und Investoren nach Artikel 26 Energiechartavertrag, 138 et seq; *Tietje*, in: Tietje (ed), International Investment Protection and Arbitration – Theoretical and Practical Perspectives, 17, 32 et seq; *Tietje/Szodruch*, ZBB 19 (2007), 498, 501 et seq with further references; *Douglas*, 74 BYIL (2003), 151, 182; *Braun*, Ausprägungen der Globalisierung: Der Investor als partielles Subjekt im Internationalen Investitionsrecht (2012); *Braun*, JWIT 15 (1) (2014), 73–116; *Peters*, Jenseits der Menschenrechte (2014), p. 289; *McLachlan/Shore/Weiniger*, International Investment Arbitration: Substantive Principles, 61 para. 3.54; 62 para. 3.58; 63–5 paras. 3.62–3.64; *Kim*, in: Bungenberg/Griebel/Hobe/Reinisch (eds), International Investment Law, 1585, 1599 et seq; *contra Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No ARB (AF)/04/5 (NAFTA), Award, 21 November 2007, para. 168 et seq.

[49] Cf *Harrison*, 13 JWIT (2012), 928, 944, who sees Article 37 II as the expression of "*a general principle which is applicable to all third party right holders*" and arrives at the same conclusion); however, the assumption of such a general principle of law is unnecessary in the present context and seems very broad, cf *Voon/Mitchell/Munro*, 29 ICSID Rev. 2 (2014), 451, 469.

[50] *Wintershall AG v. Argentina*, ICSID Case No ARB/04/14, Award, 8 Dec. 2008, at para. 114 compares investor rights to third state rights; the possibility of applying Article 37 VCLT to investors is also indicated by *Paparinskis*, EJIL 24 (2013), 617, 630, 644.

becomes what the legal consequences of the illegality of the termination agreement are. By virtue of Article 73 VCLT, these consequences are excluded from its scope and left to the law of state responsibility.[51] Accordingly, since the termination agreement does not fall under any of the VCLT's provisions, rendering an agreement invalid for example because it is contrary to *ius cogens*, and since according to Article 42 I VCLT possible reasons for the invalidity of treaties are limited to those mentioned in the VCLT, the termination agreement might well be illegal but it can still enter into force. As such, it effectively terminates the BIT and revokes the survival clause. By concluding an illegal termination agreement, the parties to the intra-EU BIT will merely have engaged their international responsibility for violating Article 37 II VCLT.

II. Consensual Revocation of Survival Clauses and the Law of State Responsibility

The law of state responsibility as codified in the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) does not provide for a secondary rule if international responsibility concerns obligations towards individuals. Article 33 ARSIWA states: *"[t]he obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, […] 2. This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."* And with regard to the second paragraph, the commentary on the ARSIWA states: *"It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account."*[52] However, since the termination agreement was illegal but effective, the BIT as the primary rule has been validly terminated. Thus, the primary rule under which individuals are entitled to invoke responsibility on their own account does no longer exist.

This situation is not unique to individual rights; it also arises with regard to the rights of third states.[53] However, in the latter case, part two of the ARSIWA at least contains secondary rules on the content of international responsibility. When it comes to individuals there are no such provisions, as Article 33 ARSIWA explicitly states.

Consequently, the termination of intra-EU BITs (or all BITs for that matter) by agreement of the parties and the revocation of the survival clause leads to a situation where there may be reasons to hold the termination agreement illegal under Article 37 II VCLT but where there is no applicable secondary rule under the ARSIWA. Notwithstanding the illegality of the termination agreement under the VCLT, there is no remedy for investors under the ARSIWA (on the influence of the ICSID Convention on this point see below, p 20).

[51] ICJ, *Case concerning the Gabcikovo-Nagymaros Project* (Hungary/Slovakia), ICJ Reports 1997, 7, 35.

[52] Yearbook ILC, 2001 II/2, 95; cf also *Wintershall v. Argentina*, ICSID Case No ARB/04/14, Award, 8 November 2008, para. 113; *Wittich*, in: Bungenberg/Griebel/Hobe/Reinisch (eds), International Investment Law, 23, 41 with further references.

[53] *Crawford*, State Responsibility: The General Part, 461.

As such, this is not an unusual situation in international law. The engagement of international responsibility accompanied by the lack of a forum has been rather the rule than the exception for some time. In the specific case of the revocation of the survival clause by agreement, this gives rise to an interesting observation: While BITs might establish international individual rights that are not subordinated to the investor's home state's interest, as they used to be in the traditional concept of diplomatic protection, the individual investor remains subject to state interest as soon as states act in concert.[54] Consequently, consensual revocation of these rights – even arbitrary revocation – seems entirely possible provided only that the political will of all state parties to a BIT mandates such revocation.

III. Arbitral Practice as a Departure from the VCLT and ARSIWA

In arbitral practice, however, there are indications that the result reached by applying the VCLT and the ARSIWA is not the end of the story. The tribunals in *Eastern Sugar* and *Walter Bau* at least implied that a termination agreement regarding a BIT still leaves the survival clause intact. In *Eastern Sugar*, the tribunal held that termination of the BIT due to the Czech Republic's accession to the EU could not have ended the BIT because of the survival clause.[55] Even though the tribunal's statement can be regarded as an *obiter dictum* since it was presented only as an "*additional reason*", its normative implications are considerable in the light of the above observations on the VCLT and the ARSIWA.

The tribunal in *Walter Bau* was even more explicit. It held that notwithstanding the explicit termination of an earlier BIT by a subsequent BIT the earlier BIT is still applicable because of the survival clause.[56] While *Walter Bau* referred to state-state arbitration in the prior BIT, the international rights in question could still be construed as substantive individual rights. Again, in the light of the above considerations, the normative implications of the award for the revocation of survival clauses are considerable. Following the awards in *Eastern Sugar* and *Walter Bau*, it should be impossible for EU member states to deprive survival clauses of legal effect by consensually revoking them.

Unfortunately, both awards refrained from giving reasons beyond apodictic statements where extensive reasoning would have seemed opportune: Placing investor rights beyond the reach of the consensual actions of those states that established these rights in a treaty constitutes a development some might call revolutionary. This notwithstanding, both awards can be perceived as the expression of a development of international law that is apt for reconstruction in established doctrinal terms.

[54] Cf *Roberts*, HJIL 56 (2) (2015), 353, 403.

[55] *Eastern Sugar B.V. v. The Czech Republic*, SCC Case No 088/2004, Partial Award, 27 March 2007, para. 174.

[56] *Walter Bau AG (in liquidation) v. Thailand*, UNCITRAL, Award, 1 July 2009, paras. 9.5 and 9.69.

1. *Possible Doctrinal Foundations*

Such a reconstruction has to begin with the observation that neither the VCLT nor the ARSIWA exclude the existence of specialized rules in specific fields potentially under customary international law for questions that are not covered by their express provisions. Human rights law is a case in point; it is widely acknowledged that the VCLT's rules on reservations that are still pervaded by the traditional paradigm of reciprocity have not developed on par with the establishment of human rights in international treaties and – without being irrelevant – apply only in a modified way.[57] This modification has largely been deduced from the ontology of human rights treaties: Since the structure of these treaties is different from the traditional reciprocal structure of international treaties, rules informed by that reciprocal structure are not the only rules that are to be applied.[58]

Comparably, the revocation of a survival clause in respect of a BIT that contains direct investor rights could be perceived as a question that is not conclusively governed by the VCLT and the ARSIWA because the structure of BITs is different from the traditional reciprocal structure of international treaties. While it would be beyond the scope of this paper to reconstruct in detail possible doctrinal reasons for the awards in *Eastern Sugar* and *Walter Bau*, two thinkable avenues shall be indicated without, however, assessing their merits: First, the awards could be seen as an expression of an emerging specific rule of state responsibility in investment arbitration mandating that the state abides by the BIT obligations under certain circumstances even in the case of consensual termination – not by virtue of the BIT itself, since it has been terminated, but by virtue of a new legal relationship established by a secondary rule. Albeit in a different context, the case for a contribution by investment tribunals to the development of customary international law has been made recently – and prominently.[59] The fact that such a rule of state responsibility would be different from and even go beyond the secondary rules of part two of the ARSIWA regarding states is not a problem as such. Article 33 II ARSIWA does not stipulate that state responsibility vis-à-vis international actors other than states has to resemble the rules regarding states.

Second, the awards could be seen as an expression of a general non-derogable principle of law protecting international individual rights against certain matters of concerted state action, possibly those that can be framed as 'arbitrary'. At least in states subscribing to the rule of law, the abrupt revocation of individual rights is an issue that regularly comes with some safeguard mechanisms protecting individual interests. In the case of subjective rights granted by ordinary law, constitutional fundamental rights impose certain requirements on the legislator's power to revoke individual rights, such as the protection of legitimate expectations. This principle has found its

[57] *Simmal Hernandez*, in: Cannizarro (ed) The Law of Treaties Beyond the Vienna Convention, 60, 66.

[58] *Ibid.*

[59] *Reisman*, ICSID Review 30 (3) (2015) 30, 616–634.

way into EU law.[60] In the case of a constitutional right, the specific requirements for constitutional amendments need to be respected. Accordingly, there could be evidence that protection against the arbitrary revocation of individual rights is an – at least emerging – general principle of law of non-derogable character.

The latter line of reasoning does not necessarily lead to protection of the investor's interests by the BIT itself or for the entirety of the survival period. A specific examination of the legal position of the investor before the revocation of the survival clause is required, it must be determined whether the revocation of survival clauses is arbitrary and it might be necessary to examine whether the parties to the BIT concluded a new agreement that protects legitimate interests in a way equivalent to the BIT.[61] This protection may, for example, be afforded by a new investment protection agreement or also by (secondary) EU law.

At this juncture, the clause contained in the exchange of notes between the Czech Republic and Malta merits special attention (see above, p. 12). While it arguably ended the protection of legitimate expectations of investors under the BIT and relocated that protection to "*the framework of the EU Acquis*", it cannot disguise the fact that contemporary EU law does not provide for ISDS and protection standards equivalent to BITs.[62] Given this lack of protection in EU law, the practical effect of the clause remains to be seen.

2. General Implications for Investment Arbitration

Both these attempts at reconstructing doctrinal reasons for awards in *Eastern Sugar* and *Walter Bau* are necessarily incomplete at this point in time, and much must be left to future developments in arbitral practice. What can be said is that the stakes are high. If the path taken by the awards is followed, international investor rights become to a certain extent emancipated from concerted state action. That would not mean that investor rights contained in BITs remain entrenched forever. It would only mean that they cannot be revoked by simple *fiat*. As such, holding states to the terms of the survival clause, even in case of its revocation in a termination agreement, might be seen as a consistent implication of the establishment of investor rights in BITs as direct rights against state action.[63]

IV. Implications for ongoing Intra-EU Investment Proceedings

Under a consistent application of *Eastern Sugar* and *Walter Bau*, ongoing intra-EU investment proceedings – just like any other proceedings during the survival period – will not be affected by a consensual termination of the BIT. In the alternative,

[60] CJEU, Case C-81/72, *Commission of the European Communities v. Council of the European Communities*, ECR 575, 5 June 1973, paras. 10, 13, 14.

[61] Cf in the context of a claim already brought, *Roberts*, HJIL 56 (2) (2015), 353, 413.

[62] Cf *Cole et al.* Legal Instruments and Practice of Arbitration in the EU, Study for the European Parliament (2014), <http://www.europarl.europa.eu/studies> (visited 29 October 2015).

[63] *Braun*, JWIT 15 (1) (2015), 73, 114 et seq; *Peters*, Jenseits der Menschenrechte, 289.

the following considerations apply: In ICSID arbitration, the case is clear because Article 25 ICSID protects consent to arbitration from unilateral withdrawal. The case is less clear in non-ICSID arbitration. If the acceptance by the investor of consent given by the state in a BIT has led to the conclusion of an arbitration agreement, the question revolves around the nature of this agreement. It is not an international treaty since the investor is not a state. However, if it is a simple contract under domestic law, it would be subject to the state's sovereign power to change its internal legal order. Ultimately, the situation recalls the old cases of state-contracts and their possible internationalization.[64] In those cases, choice of law clauses providing for international law were of primary importance.[65] Since BITs generally contain choice of law clauses providing for international law, there are good reasons to hold the state to the arbitration agreement notwithstanding termination of the BIT. Moreover, since a tribunal has the power to determine its own competence,[66] and since that determination is usually made on the basis of the facts and the law that applied when the claim was brought, there are good reasons to hold ongoing arbitration proceedings unaffected by the revocation of the survival clause. How an explicitly *retroactive* termination of BITs might play out in this regard remains to be seen.

E. Beyond Investment Arbitration: Consensual Revocation of Survival Clauses and the State of International Individual Rights

By way of inductive reasoning, the above observations point beyond the law of investment protection and have implications for the general state of international individual rights such as human rights. In order to make such an inductive conclusion plausible, a set of assumptions has to be made. Most importantly, international investment law has to be understood as a system in which general statements can be made as opposed to statements concerning only a specific treaty.[67] Moreover, international law as a whole, including international investment law, has to be understood as a system characterized by logical coherence that gives rise to expectations of at least minimal doctrinal consistency.[68] On this basis, two specific assumptions can be spelled out: First, different sets of international individual rights are in principle – if not in all their aspects – comparable. Second, on the basis of and to the extent of that comparability, considerations that seem rational regarding one set of international individual rights should seem rational with regard to the comparable set as well.[69] Under these

[64] *von Walter*, in: Bungenberg/Griebel/Hobe/Reinisch (eds), International Investment Law, 80–93.

[65] Eg: *Texaco Overseas Petroleum Company & California Asiatic Oil Company (Topco-Calasiatic) v. Libya*, Awards of 27 November 1975 and 19 January 1977, ILR 53 (1979), 389, para. 45.

[66] *Wittich*, in Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 70, para. 17.

[67] *Schill*, in: Bungenberg/Griebel/Hobe/Reinisch (eds), International Investment Law, 1817, 1835; *Schill*, The Mulilateralization of International Investment Law, 8–11.

[68] Cf: *Benvenisti*, GYIL 50 (2008), 393, 394 et seq.

[69] This article is not the place to discuss the plausibility of these assumptions. Suffice it to say that if legal regimes are conceived as autopoietic systems that follow their own, distinct criteria of rationality, there is no room for a presumption of doctrinal consistency between the functionally

assumptions each specific set of international individual rights can serve as a laboratory for observing the state of international individual rights more generally. This article compares investment law to human rights law. Other possible international individual rights include consular rights.[70] As opposed to these sets of international individual rights, international investment law currently presents the opportunity to observe the persistence or demise of international individual rights in the face of concerted state action.

The comparability of human rights and investor rights is subject to intensive discussion.[71] The discussion regularly concerns the appropriate way of conceiving the investment treaty system. *Roberts* distinguishes different paradigms of conceiving investment law, one of which is the "*human rights paradigm*".[72] *Paparinskis* speaks of the "*interpretative ordinariness*" in a similar vein.[73] For the purposes of this article it is neither necessary to understand the whole system of investment arbitration as being comparable to the protection of human rights, nor does the present study seek to transfer insights from human rights to investment law. Rather, it is the other way around: The study seeks to determine whether and to what extent insights from investment law allow inferences for human rights law. In order to establish the necessary comparability for this transfer, it suffices that both systems relate to each other like intersecting circles. To the extent of the intersection, both systems are comparable. Statements that appear rational in one system should, to that extent, appear rational in the other system too.

Recent contributions regularly reject the notion that the question of consensual termination of BITs can be solved by relying on human rights law,[74] because, as opposed to investor rights, which are allegedly established on a reciprocal basis, "*human rights are inherent in the notion of being a human.*"[75]

It is true that human rights law cannot serve as a model for the present problem. However, this is because there has never been a comparable situation in human rights law and not because human and investor rights were worlds apart (I.). Rather, with regard to joint termination, looking to developments in investment arbitration may produce insights for human rights law. While there are undeniable differences be-

specific regimes, cf *Teubner/Fischer-Lescano*, Michigan Journal of International Law 25 (4) (2004), 999–1046 and for the critique, *Paulus*, Michigan Journal of International Law 25 (4) (2004), 1047–1053.

70 *LaGrand* (Germany v. US) ICJ Reports 2001, 466, para. 77; *Avena and Other Mexican Nationals* (Mexico v. US) ICJ Reports 2004, paras. 40, 124; *Peters*, Jenseits der Menschenrechte, 307–343.

71 *Roberts*, 56 HJIL 2 (2015), 353, 406; *Paparinskis*, EJIL 24 (2013), 617, 622 et seq; *Roberts*, AJIL 107 (2013), 45, 72 and 75; *Hirsch*, in: Dupuy/Francioni/Petersmann (eds) Human Rights in International Investment Law and Arbitration, 109; *Roberts*, 104 AJIL 104 (2010), 179, 205; *Van Harten*, Investment Treaty Arbitration and Public Law, 136–43; *Peterson*, Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights law within Investor-state Arbitration, 23–26; *Peters*, Jenseits der Menschenrechte, 387–419.

72 *Roberts*, AJIL 107 (2013), 45, 72 and 75.

73 *Paparinskis*, EJIL 24 (2013), 617, 619.

74 *Roberts*, HJIL 56 (2) (2015), 353, 406; *Voon/Mitchell/Munro*, 29 ICSID Rev. 29 (2) (2014), 451, 458.

75 *Roberts*, HJIL 56 (2) (2015), 353, 406.

tween human rights and investor rights, the intersecting area between both circles justifies transferring considerations regarding investor rights to human rights law (II.). As a result, awards such as *Eastern Sugar* and *Walter Bau* might have considerable implications not only on the state of investor rights but also human rights and more generally international individual rights as such (III).

I. No Direct Precedent in Human Rights Law

It would seem there has never been a termination of a treaty according to Article 54 (b) VCLT in human rights law. Human rights law came closest to that situation when North Korea attempted to withdraw from the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee (HRC) stated that "*the rights of the Covenant belong to the people*" and therefore cannot be divested in any way.[76] This statement might be understood as implying that the ICCPR rights cannot be divested even by agreement of all parties.[77] The UN Secretary General, however, would have allowed North Korea to withdraw from the ICCPR provided that all other parties consented.[78] By implication, a termination under article 54 (b) VCLT would also be possible.

However, even the HRC's statement is not conclusive in this regard. Although the generality of the statement that the rights of the Covenant "*belong to the people living in the territory of the State party*" and "*that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding […] any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant*"[79] plausibly seems to imply that such rights are protected against joint state action, this conclusion is placed in doubt by the context of the statement. The HRC deduced from this statement only "*that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it*".[80] There is no explicit mention of termination of the Covenant. Only if such termination is not an *aliud* to denunciation or withdrawal but rather implies the latter can the HRC's statement be transposed to joint termination. The VCLT, however, clearly distinguishes between termination, denunciation and withdrawal in its Article 42 II.

Moreover, the HRC's statement does not apply to human rights as such but only to a treaty that does not *"contain any provision regarding its termination and does not*

[76] *UNHRC*, 'General Comment 26' (1997) UN Doc CCPR/C/21/Rev1/Add8/Rev1 (Human Rights Committee, General Comment 26 (61), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1631st meeting.), para. 4.

[77] *Roberts*, HJIL 56 (2) (2015), 353, 406.

[78] Notification of Withdrawal from the International Covenant on Civil and Political Rights, U.N. Doc. C.N.467.1997.TREATIES-10, Depositary Notification, 23 August 1997.

[79] *UNHRC*, 'General Comment 26' (1997) UN Doc CCPR/C/21/Rev1/Add8/Rev1 (Human Rights Committee, General Comment 26 (61), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1631st meeting.), para. 4.

[80] *Ibid.*, para. 5.

provide for denunciation or withdrawal".[81] By contrast, Article 58 of the European Convention on Human Rights (ECHR) and Article 78 of the American Convention of Human Rights (ACHR) provide explicitly for denunciation. Venezuela has, in fact, denounced the ACHR,[82] but such tendencies are not limited to South America.[83] From the lack of a denunciation provision, the HRC concluded that "*the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties.*"[84] As shown above, the VCLT allows termination of a treaty by consent of all the parties to it. Conspicuously, the remainder of the HRC's note does not further refer to termination but only to denunciation and withdrawal. The core of the remaining argument is that the drafters of the ICCPR "*deliberately intended to exclude the possibility of denunciation*"[85] and that "*it is clear that the Covenant is not the type of treaty which, by its nature, implies a right of denunciation*" and that "*[a]s such, the Covenant does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect.*"[86] Accordingly, it can hardly be said that the HRC's position would indeed emancipate the ICCPR's rights from the concerted will of all state parties to it. Therefore, dismissing the legal situation in human rights law as a precedent for the joint termination of a BIT is entirely justified, but not on the basis of an alleged incomparability of human rights with investor rights, but simply because so far there has not been a comparable situation.

That does not mean that such a situation could not theoretically arise in human rights law. Along with the termination of a treaty like the ICCPR by all treaty states, such a situation could have been possible with regard to minimum clauses of application.[87] With regard to these clauses, similar issues at least could have arisen, if all states party to the treaty decided to terminate it by mutual agreement before the expiration of the minimum duration of application. Structurally, the legal issues are comparable because both concern the establishment of international individual rights, a "pledge"[88] so to speak, to guarantee these rights for at least the minimum period of application or

[81] *Ibid.,* para. 1.

[82] Government of the Bolivarian Republic of Venezuela, Ministry of the Popular Power for Foreign Affairs of the Bolivarian Republic of Venezuela, Note 000125, 9 (2), 6 September 2012, http://www.oas.org/dil/esp/Nota_Republica_Bolivariana_de_Venezuela_al_SG_OEA.PDF (last visited on 29 October 2015).

[83] Cf the position paper of the Swiss People's Party <http://www.svp.ch/de/assets/File/Positionspapier_def.pdf?doaction=return&emailid=37A9D0E7-E505-465D-AEF11E5638CB0C5A&email=crausaz@svp.ch&nocache=1>; or the position paper of the British Conservatives <https://www.conservatives.com/~/media/Files/Downloadable%20Files/HUMAN_RIGHTS.pdf> (last visited on 29 October 2015).

[84] *UNHRC*, 'General Comment 26' (1997) UN Doc CCPR/C/21/Rev1/Add8/Rev1 (Human Rights Committee, General Comment 26 (61), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1631st meeting.), para. 1.

[85] *Ibid.*, para. 2

[86] *Ibid.*, para. 3.

[87] Eg: Article 58 ECHR; Article 78 ACHR.

[88] Cf on human rights *Brilmayer*, BYIL 77 (2006), 163–202.

the survival period. Before the expiration of that period, *all* states party to the treaty act jointly to divest these rights. In that respect, and provided that both sets of rights are comparable, the awards in *Eastern Sugar* and *Walter Bau* indicate a development regarding international individual rights that even goes beyond the HRC's statement.

II. The Extent of Comparability between Human and Investor Rights

Based on these observations it seems tempting to conclude that if investor rights are already to a certain extent emancipated from joint state action, as the awards in *Eastern Sugar* and *Walter Bau* indicate, the same must be true above all for human rights. However, even such an argument presupposes comparability to an extent that justifies the conclusion. If investor rights are entirely incomparable to human rights, not even the argument *a minore ad maius* can stand.

1. Implications of Differences between Human Rights and Investor Rights

Investor rights are not human rights. The latter's place in the history of ideas,[89] the plausibility of their being founded on the notion of being human,[90] the dignity of the individual[91] and their universality[92] are all characteristics that set human rights apart from investor rights. Investor rights are not considered to be inherently connected to being an investor. There are also structural differences. Unlike human rights, investor rights do not apply against state action as such but only against the host state of the investor.[93] Moreover, human rights treaties are regularly multilateral in character while there is no comparable investment treaty thus far.[94] There are normative differences because investor rights, unlike some human rights, do not have *ius cogens* character such as the prohibition of torture.[95] Finally, there are the aforementioned alleged teleological differences (see above, p 22). While human rights are established for the sake of the individual as such, investor rights allegedly are a mere means to an end namely to further economic growth in the contracting states. They are "*explicitly linked with and*

[89] On the history of ideas of human rights, eg: *Joas*, The Sacredness of the Person; *Moyn*, Human Rights and the Uses of History; *Macklem*, The Sovereignty of Human Rights; *Bielefeldt*, Menschenrechte in der Einwanderungsgesellschaft; *Reuter*, (ed) Ethik der Menschenrechte; *Tomuschat*, Human Rights, 73–95.

[90] *Roberts*, HJIL 56 (2) (2015), 353, 406; *Paparinskis*, EJIL 24 (2013), 617, 624; *Higgins*, Law Review 52 (1989), 1, 11.

[91] *Tomuschat*, Human Rights, 85–91.

[92] *Voon/Mitchell/Munro*, 29 ICSID Rev. 29 (2) (2014), 451, 458.

[93] *Roberts*, AJIL 107 (2014), 45, 72.

[94] See, however, *Schill*, The Multilateralization of International Investment Law, 15 et seq, and on the failed Multilateral Agreement on Investment, 53 et seq.

[95] *Ibid.,* 71; if an investor is tortured in a manner related to his investment the *ius cogens* rule and FET are violated. Whether there is a portion of FET that can claim *ius cogens* character itself is a different question. Moreover, certain state action can violate BIT standards and human rights treaties at the same time as in the case of denial of justice and expropriation. On the use of human rights jurisprudence in investment law, *Leonhardsen*, JIDS 3 (1) (2012), 95, 123; *Leonhardsen*, in: Gruszczynski/Werner (eds) Deference in International Courts and Tribunals, 135, 149.

justified by utilitarian considerations"[96] that are exchanged on a *quid pro quo* basis and *"between states establishing reciprocal rights and obligations.*"[97]

All of these differences, except for the alleged teleological one, are correct but not decisive in the present context. The teleological difference merits closer analysis but will prove to be a chimera. As a result, human and investor rights are comparable to an extent that allows making certain inferences for human rights law from observing phenomena in investment arbitration:

The place of human rights in the history of ideas is obviously different from investor rights. This observation, however, remains descriptive. As such, it does not lead to any distinct legal consequences. The plausibility of founding investor rights on an inherent quality of the human being or even investors is certainly doubtful, but as we have seen regarding the HRC's statement on the ICCPR, the plausibility of founding ICCPR rights on an inherent quality of the individual or their universal character did not emancipate the ICCPR rights from joint state action. Accordingly, the argument of an inherent quality does not predetermine the present problem. The structural differences do not prevent investor rights from being comparable to the dimension of human rights for individuals abroad. The multilateral character of existing human rights treaties does not exclude the theoretical possibility of bilateral human rights treaties that are, in the same way as their multilateral counterparts, motivated by a commitment to the inherent worth of human beings. Would these human rights be worth less than those contained in a multilateral treaty? A positive answer to this question is possible only on the basis that human rights are exclusively owed to states as obligations *erga omnes partes.*[98] If they are owed to the individual as such,[99] there should not be a difference between hypothetical bilateral and existing multilateral human rights treaties. Finally, the fact that investor rights do not have *ius cogens* quality merely sets them apart from those human rights that have *ius cogens* quality and not from what *Roberts* termed "*lower-ranked human rights norms, like property rights and protections against discrimination.*"[100]

What remains is the alleged teleological difference. Is it really true that investor rights are mere means to an end that have been negotiated on a *quid pro quo* basis in order to further interests of the contracting states while human rights protect the individual's interests for their own sake and have, as such, been concluded entirely for non-state reasons?[101] Even if this is true, does it make investor and human rights incomparable? This question relates to the reciprocal character of investment protection treaties: If investor rights are conceived as the result of a reciprocal bargain and are

[96] *Paparinskis*, EJIL 24 (2013), 617, 623; see also *Roberts*, HJIL 56 (2) (2015), 353, 405.

[97] *Roberts*, AJIL 107 (2014), 45, 72.

[98] *Schmalenbach,* in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 26, para. 43; *Paparinskis*, SIEL Online Proceedings WP 23/08 (2008), 1, 54 <http://www.ssrn.com/link/SIEL-Inaugural-Conference.html> (last visited 29 October 2015).

[99] *Schmalenbach,* in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 26, para. 41.

[100] *Ibid.*, 71.

[101] *Roberts*, HJIL 56 (2) (2015), 353, 406; *Roberts*, AJIL 107 (2014), 45, 71; *Voon/Mitchell/Munro*, 29 ICSID Rev. 29 (2) (2014), 451, 458.

ultimately meant to further the interests of the BITs contracting states, it seems compelling to conclude that once both contracting states fail to see their interests furthered by granting these rights they should be entirely free to jointly terminate the BIT. In this case, there is no reason to uphold any of the obligations assumed against the will of both states since no formerly protected interest is put in jeopardy by the joint termination.[102] As a result, the awards on *Eastern Sugar* and *Walter Bau* would be an oddity, the above tentative rationalizations would seem futile (p. 22), and there would be nothing to learn for international individual rights more generally. Only if investment protection treaties do not merely serve state interests on a *quid pro quo* basis but also protect investor interests for their own sake do they transcend the reciprocal paradigm of international law just as human rights treaties transcend it. Only in that case, the joint termination of investment treaties touches upon interests beyond the reciprocal interests of the contracting states with the result that the situation becomes comparable to human rights law.

It has to be noted that reciprocity in this context must not be misunderstood. Of course, a BIT, just like any other bilateral treaty, is formally a reciprocal treaty. It has been concluded between two states.[103] What is decisive is whether the structure of the substantive rights and obligations is such that it regulates a genuine legal relationship between the contracting states in that it protects ultimately only interests of the contracting states even though it benefits investors in the process.[104] Put differently, do BITs protect foreign investors *only* because they belong to the other contracting state as it used to be under the law of aliens[105] or do they acknowledge independent interests of investors for whose protection the contracting states assume obligations? At first sight, the reciprocal paradigm might seem to impose itself, since the investor regularly needs to be an investor of the other contracting state. There are, however, considerations that render this conclusion far less cogent.

2. Investor Rights beyond Reciprocity

The question whether BITs protect foreign investors on a *quid pro quo* basis and *only* because they belong to the other contracting state rather than acknowledging independent interests of investors for whose protection the contracting states assume obligation as under human rights treaties is ultimately a question about the object and purpose of BITs. Reconstructing that object and purpose of BITs is not a simple matter of treaty interpretation. Rather, it is matter of establishing one of the means of

[102] *Roberts*, HJIL 56 (2) (2015), 353, 405: "[*t]he purposes of investment treaties are to provide investor protection in order to promote foreign investment while not overly compromising state sovereignty. If it turns out that increased investment protection does not in fact result in an increase in investment promotion, let alone an increase in home and host state development, we should expect treaty parties to want to be able to revoke their commitments.*"

[103] *Simma/Pulkowski*, EJIL 17 (2006), 483–526; cf also *Verdross/Simma*, Universelles Völkerrecht, 479.

[104] *Simma/Pulkowski*, EJIL 17 (2006), 483–526; referring to ECHR, *Ireland v. United Kingdom*, App. No 5310/71, 18 January 1971, Ser. A No 25 para. 239.

[105] Cf *Hobe*, in: Bungenberg/Griebel/Hobe/Reinisch (eds), International Investment Law (2015), 6–23.

treaty interpretation under Article 31 I VCLT.[106] Although that concept was already used extensively by the PCIJ and the ICJ before its codification in the VCLT,[107] it has been noted that "*the relevant passages reveal little of the process by which the Courts arrived at the determination of the object and purpose of a given treaty.*"[108] In fact, the four dissenting judges in the ICJ's advisory opinion *in Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* have even doubted its usefulness as a rule of interpretation.[109]

Applying Article 31 I VCLT, it is commonly agreed that there is no other statement of the parties' shared intentions when concluding the treaty than the treaty's text.[110] Therefore, its object and purpose needs to be established on that basis.[111] Every text needs interpretation.[112] Accordingly, an obvious vicious circle looms, since *"[i]t is not possible to be guided in the interpretation of a treaty by its object and purpose when those have to be elucidated first by interpreting the treaty.*"[113] Looking to the treaty's preamble as mentioned in the ILC Commentary to the VCLT[114] is a common and pragmatic approach in arbitral practice.[115] Yet it merely relocates the problem safe for the case that the meaning of the preamble emerges 'unambiguously' (at least within the decisive epistemic discourses of international judges, lawyers and academics).[116] Such clear cases refer to a situation where the range of possible meanings according to the semantics of the words used under no circumstances allows for a specific interpretation:[117] The words "*prior to December 31*" do not allow interpretation as "*on or before December 31*".[118] Preambles, however, are regularly characterized by their generic terms and rarely allow for a conclusive statement as to their normative content.[119] Can it real-

[106] *Gardiner*, Treaty Interpretation, 19; *Buffard/Zemanek*, Austrian Review of International & European Law 3 (1998), 311, 343; specifically on investment arbitration: *Weeramantry*, Treaty Interpretation in Investment Arbitration, 67-76.

[107] See the cases discussed by *Buffard/Zemanek*, Austrian Review of International & European Law 3 (1998), 311, 315 et seq.

[108] *Ibid.*, 317.

[109] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion 28 May 1951, ICJ Reports 1951, 15, 44.

[110] *Dörr,* in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 31, para. 56; *ADF Group Inc. v. United States of America*, ICSID Case No ARB (AF)/00/1, Award, 9 January 2003, para. 147.

[111] Cf *Raz*, Between Authority and Interpretation, 2009, 287: *"So the normal way of finding out what a person intended to say is to establish what he said."*

[112] *Luhmann*, Recht der Gesellschaft, 1995, 255 f.

[113] *Buffard/Zemanek*, Austrian Review of International & European Law 3 (1998), 311, 333.

[114] Yearbook ILC, 1966/II, 221.

[115] Cf *Dolzer/Schreuer*, Principles of International Investment Law, 29.

[116] Even the question whether there is such a thing as an 'unambiguous' meaning of legal texts is subject to discussion, cf only *Luhmann*, Recht der Gesellschaft, 256; *Fish*, Wash. & Lee Law Review 45 (1988) 883–902; *D'Amato*, 84 Northwestern University Law Review 84 (1989), 250–256; *Klatt*, Theorie der Wortlautgrenze.

[117] *Bankowski/MacCormick*, in: MacCormick/Summers (eds), Interpreting Statutes. A Comparative Study, 358, 384.

[118] United States v. Locke, 471 U.S. 84, 93 (1985).

[119] Cf *ADF Group Inc. v. United States of America*, ICSID Case No ARB (AF)/00/1, Award, 9 January 2003, para. 147.

ly be said that preambles such as the following 'unambiguously' limit the object and purpose of BITs to the furtherance of state interests while excluding the protection of investor interests for their own sake?:

"*desiring to intensify economic co-operation between the two States, intending to create favourable conditions for investments by investors of either State in the territory of the other State, recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations*"[120]

It is submitted that the semantics of the words "*to create favourable conditions for investors*" do at least not allow presenting the above interpretation as the clear meaning of 'unambiguous' wording. Rather, this preamble requires interpretation,[121] and its interpretation is at least potentially controversial. We have come full circle.

These problems are general problems related to the interpretation of legal texts and have been known for a long time.[122] The abundant literature they have spawned cannot be recapitulated here.[123] Suffice it to say that one of the most common strategies for overcoming the lack of intra-legal determinants for establishing the object and purpose of a legal norm – the appeal to extra-legal criteria of rationality, be they philosophical, empirical, economic or otherwise[124] – is hermeneutically unsatisfying.[125] Moreover, while it is clear that every interpretation is based on certain preunderstandings of the interpreter that does not mean that a legal text *ought* to be interpreted based on one specific preunderstanding.[126]

This does not imply that it is impossible to make a plausible statement about the object and purpose of treaties. After all, legal meaning is generally established within an existing discourse of epistemic communities that follow to certain standards of argumentation, use established doctrinal categories and precedent. Investment law is no exception. However, it implies that any broad-brush statement that purports to identify the general object and purpose of BITs clearly and simply should be questioned and examined in its discursive relation to countervailing assertions of the object and purpose of BITs. If the interpretation of preambles as a means to establish the object and purpose of BITs cannot rely on unambiguous wording, such interpretation at least has to be firmly embedded in existing discourse of the relevant interpretive actors such as previous tribunals and scholarly opinion.[127] So far, arbitral practice generally does not allow reduction of the object and purpose of BITs to the furtherance of state interests and exclusion of genuine investor interests entirely.[128] While some tribunals

[120] Preamble, German-Model BIT 2008.

[121] *Gardner*, Treaty Interpretation, 196.

[122] *Merkl*, Grünhutsche Zeitschrift für das Privat- und Öffentliche Recht der Gegenwart, 42 (1916), 535–556, reprinted in: Klecatsky/Marcic/Schambeck (eds), Wiener rechtstheoretische Schule, 1059, 1070 et seq.

[123] Generally see, *Barak*, Purposive Interpretation in Law; for international law recently, *Linderfalk*, EJIL 26 (1) (2015), 169–189.

[124] *Wischmeyer*, Zwecke im Recht des Verfassungsstaates, 331.

[125] *Ibid.*, 332.

[126] *Klatt*, Theorie der Wortlautgrenze, 104.

[127] *Ibid.*, 107 and 113.

[128] *Dolzer/Schreuer*, Principles of International Investment Law, 29 et seq.

might support that view[129] others focus exclusively on investor protection.[130] Others still are cautious to deduce specific legal consequences from the object and purpose.[131] Most tribunals, however, seem to refer to a mixture of both.[132] All of this means, that the statement that BITs do not serve genuine investor interests but only some higher end can be based only on a specific part of the existing interpretive discourse. It cannot serve as a generic characterization of investment arbitration.

The present article does not seek to establish a competing vision of the general object and purpose of BITs. For the purposes of this article it is sufficient to note that most BITs seem to combine the protection of genuine investor interests with the furtherance of economic state interests. On that basis, the question becomes whether at least this mixture allows for the conclusion that BITs are non-reciprocal treaties. The present article holds that it does, since neither the general structure of investment arbitration nor certain phenomena such as countermeasures can be explained via the categories of reciprocity (a.). Moreover, the fact that BITs further both state interests and individual interests does not set them apart from human rights treaties that are considered non-reciprocal (b.). Taken together, these points are plausible indications for a non-reciprocal understanding of BITs.

a) Non-Reciprocal Phenomena in Investment Arbitration

The first non-reciprocal phenomenon relates to the general structure of investment arbitration. Constructing BITs as *exclusively* furthering public interests which states exchange *quid pro quo* would be equal to claiming that the protection of private property in BITs is in fact protection of the home state's public interest in the private property of its citizens. Such a construction is rooted in a corporatist vision of the state in which individuals are parts of an organic whole. Seeing the state as such is not

[129] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability, 30 July 2010, para. 200.

[130] *Tokios Tokelés v. Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 85; *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Decision on Jurisdiction, 11 May 2005, para. 142; cf also *Wälde*, in: Binder/Kriebaum/Reinisch/Wittich (eds), International Investment Law for the 21st Century, 724, 732; but *Ortino*, American Review of International Arbitration 24 (3) (2013), 437, 438-446.

[131] Eg: *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27. April 2006, para. 68 et seq*; ADF Group Inc. v. United States of America*, ICSID Case No ARB (AF)/00/1, Award, 9 January 2003, para. 147*; SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No ARB/02/6, Decision on Jurisdiction, 29 January 2004; para. 116; but *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction, 6. August 2003, para. 171; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para. 292; *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 20001, para. 155, the latter two awards cite the preamble but do not deduce specific legal consequences from it, *Dolzer/Schreuer*, Principles of International Investment Law, 29 et seq.

[132] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No ARB/03/15, Decision on Jurisdiction, 27. April 2006, para. 70; *Dolzer/Schreuer*, Principles of International Investment Law, 29 et seq.

alien to international law, since it corresponds to the classical *Westphalian* view. However, such a perspective presupposes what it should prove. Rather than examining whether there are international norms that protect individual interests for their own sake, it is premised on an inherent limitation of the possible extent of this protection. This view fails to see that investors, just like any individual, can and do have interests that do not correspond to those of their home state and that there are international norms that protect these interests.[133] In fact, protecting individual interests, even those in potential conflict with the home state's public interest, was the initial point of investment treaties.[134] If states wanted to protect only such interests that correspond to state interests, the system of diplomatic protection would have sufficed. The notion of reducing BITs to furthering state interests is thus at odds with the possibility for private entities to recover damages for the violation of private investment on their own account and for private enjoyment in the case of a favorable award.

The second non-reciprocal phenomenon consists of the availability of countermeasures should a state violate investor rights. In the reciprocal paradigm a state party to a BIT would be permitted under Article 49 I ARSIWA to discriminate against and treat unfairly investors of the other state party to the BIT because the latter has discriminated against and treated unfairly investors of the former. None of the exceptions in Article 50 I ARSIWA would prevent this action, including, notably, the protection of "fundamental human rights". However, the limitation of Article 50 I ARSIWA to "fundamental human rights" is usually not interpreted as implying that appropriate countermeasures for the violation of non-fundamental human rights consist of the violation of such rights by another state.[135] *Crawford* states that "*[h]uman rights obligations are not, in the first instance at least, owed to particular states, and it is accordingly difficult to see how a human rights obligation could itself be a subject of legitimate countermeasures.*"[136] For this reason, human rights treaties are regularly held to transcend the reciprocal paradigm.[137] Accordingly, if it is agreed that investor rights are individual rights owed "*in the first instance at least*" directly to the investor, the same rationale should apply: It is difficult to see how they could themselves be the subject of legitimate countermeasures. As in the case of human rights, the fact that the violation of obligations arising from investment treaties does not give rise to classical reciprocal countermeasures is a strong indication that investment treaties are not reciprocal treaties. Arbitral practice supports this view. The tribunal in *Archer Daniels* came to the conclusion that the substantive investment protection standards contained in NAFTA did not establish direct international rights of investors and held

[133] Cf *Verdross/Simma*, Universelles Völkerrecht, 255.

[134] *Dolzer/Schreuer*, Principles of International Investment Law, 20.

[135] *Verdross/Simma*, Universelles Völkerrecht, 518.

[136] *Crawford*, State Responsibility: The General Part, 692; see also *Simma*, RdC 250(1994), 217, 337–338, 364–376; *Paparinskis*, SIEL Online Proceedings WP 23/08 (2008), 1, 53 < http://www.ssrn.com/link/SIEL-Inaugural-Conference.html> (last visited 29 October 2015).

[137] *Schmalenbach*, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 26, para. 39.

countermeasures viable in principle.[138] The tribunals in *Corn Products* and *Cargill* qualified these standards as direct rights and held countermeasures against them illegal.[139]

b) The Role of State Interests in BITs and in Human Rights Law

The argument for the reciprocal character of BITs regularly assumes a dichotomy between the furtherance of state interests and individual interests in treaties. It contrasts the observation that states also pursue their own economic interests by negotiating BITs with the observation that human rights are not subject to comparable instrumental considerations.[140] While these observations as such are correct, they do not allow the conclusion to be drawn that states fail to have a public interest in the establishment of human rights.[141] This statement is arguably at odds with the ICJ's 1951 *Advisory Opinion on Reservations to the Genocide Convention*. Here, the ICJ stated that the "*contracting States do not have any interest of their own*" in such a convention.[142] However, the observation that the prohibition of genocide – a norm recognized as *ius cogens* – is not dependent upon state consent[143] does not imply that states fail to have a genuine public interest in the prevention of genocide. Rather it seems safe to say that the majority of states at the time of the opinion remained neither agnostic nor indifferent to the normative qualification of genocide and still do so today.

The ICJ's statement becomes understandable if state politics are summarily identified with a threat to individual freedom fed by an insatiable appetite for power.[144] For an international law whose genuine province, *inter alia*, always used to be the law of war,[145] this understanding of state politics comes naturally. The hypertrophy of sovereignty that took place only some years before the advisory opinion certainly precipitated the adoption of this understanding. However, an international law that thus contents itself with seeing the state from without and that remains indifferent to diverging forms of organizing political order within the state[146] risks overlooking the in-

[138] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v. Mexico*, ICSID (AF) Case No ARB/(AF)/04/5, Award, 21 November 2007, paras. 176–179.

[139] *Corn Products International, Inc. v. The United Mexican States*, ICSID Case No ARB(AF)/04/01 (NAFTA), Decision on Responsibility, 15 January 2008, para. 12, 169, 173; *Cargill, Incorporated v. United Mexican States*, ICSID Case No ARB(AF)/05/2 (NAFTA), Award, 18 September 2009, para. 422 et seq Comparable arguments can be drawn from the interpretation of a BIT by the contracting states, *Braun*, Ausprägungen der Globalisierung, 174 et seq, and the difficult question of waivers of treaty rights, *Peters*, Jenseits der Menschenrechte, 289 et seq.

[140] At times, the reasons states enter into human rights treaties can be rather instrumental, c.f.: *Hathaway*, The University of Chicago Law Review 72 (2005), 469, 474.

[141] *Verdross/Simma*, Universelles Völkerrecht, 480 referring *inter alia* to ICJ, *South West Africa, Second Phase*, ICJ Reports 1966, Judgment, 18 July 1966, 6, 32.

[142] ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 1951, Advisory Opinion 28 May 195115, 23.

[143] ECHR, *Stichting Mothers of Srebrenica and others against the Netherlands*, Decision, 11 June 2013, Application No 65542/12, para. 67.

[144] *Möllers*, The Three Branches, 230.

[145] Cf *Grotius*, De Jure Belli ac Pacis Libri Tres, 1st edition Paris 1625, reprinted *Neff* (ed), Hugo Grotius: On the Law of War and Peace, 2012; *Kennedy*, HILJ 27 (1) (1986), 1–98.

[146] The advisory opinion preceded *Franck*, AJIL 86 (1) (1992), 46–91 (The Emerging Right to Democratic Governance).

timate relationship between the rise of the modern constitutional state, the liberation of the individual from his or her corporatist and religious bonds and the emergence of human rights.[147] Under this account the generic statement that considerations of humanity are not state interests seems strangely at odds with the foundation of political order on individual freedom that began in the 18th century.[148] Indeed, if "*[l]e but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme*",[149] it would be remarkable if human rights treaties protecting these "*droits naturels et imprescriptibles*" fell outside the genuine interests of the political order as such. It is therefore only consequent for the ICJ to recognize that an "immaterial benefit"[150] accrues to states under human rights treaties.[151] What exactly this immaterial benefit consists of is necessarily open-ended, given the heterogeneity of states, cultures, legal systems and religions. While some might see the respect for human rights founded in the humanist tradition of European Enlightenment, others might see it founded in the Catholic belief in man being made in God's image, still others as a cultural transformations of values that emerged in response to historical experiences of violence[152] or, more prosaically, as "institutions" that are necessary corollaries of a functionally differentiated society because they guarantee the autonomy of society's subsystems.[153] Why should international law recognize only one of these understandings as a legitimate motivation for the respect of human rights? Agnosticism in this respect leads to neither unfettered relativism nor to diverging understandings of, for example, torture, as long as it is acknowledged that the determinative criterion for the normative force of human rights is the fact that they are legal phenomena subject to legal discourses regarding their interpretation and application. *Tomuschat* wrote well before the "end of history" was announced[154] and that announcement was revoked[155] that the narrative a state adopts about the International Bill of Rights matters much less than

147 *Luhmann*, Die Verfassung als evolutionäre Errungenschaft, Rechtshistorisches Journal 9 (1990), 176, 180 et seq, on this aspect of constitutionalism cf *Grimm*, The Achievement of Constitutionalism and its Prospects in a Changed World, in: Dobner/Loughlin (ed), The Twilight of Constitutionalism (2010), 3, 10.

148 *Grimm*, in: Münkler/Fischer (eds) Gemeinwohl und Gemeinsinn im Recht, 125.

149 Article 2, Déclaration des Droits de l'Homme et du Citoyen du 26 août 1789, cf also the preamble of the Declaration of Independence.

150 *Schmalenbach*, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 26, para. 37.

151 Cf *Verdross/Simma*, Universelles Völkerrecht, 480 referring *inter alia* to ICJ, *South West Africa, Second Phase*, ICJ Reports 1966, Judgment, 18 July 1966, 6, 32; *Schmalenbach*, in: Dörr/Schmalenbach (eds), Vienna Convention on the Law of Treaties: A Commentary, Article 26, para. 37.

152 On these approaches, *Joas*, The Sacredness of the Person.

153 *Luhmann*, Grundrechte als Institution; on Luhmann: *Verschraegen*, Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory, Journal of Law and Society 29 (2) (2002), 259–281; *cf further the approaches of Moyn*, Human Rights and the Uses of History; *Macklem*, The Sovereignty of Human Rights; *Tomuschat*, Human Rights, 73–95.

154 *Fukuyama*, The National Interest 16 (1989), 3; *Fukuyama*, The End of History and the Last Man (1992).

155 *Paulus*, Humboldt Forum Recht 5 (2011), 56, 59.

the fact that "*agreement has indeed been reached*", as a result of which the International Bill of Rights is a binding legal instrument.[156]

Consequently, it is fair to say that human rights treaties as legal phenomena serve both state and individual interests. Accordingly, the fact that investment treaties as legal phenomena serve both state and individual interests does not set them apart from human rights treaties. The fact that both kinds of treaties serve different state interests – material in case of investment treaties, immaterial in case of human rights treaties[157] – does not affect the structural similarity between the obligations assumed.

3. Conclusion

It follows from all of the above that human rights and investor rights are to a certain extent different and to a certain extent comparable. Human rights are recognized by states because of an inherent quality of individuals, investor rights are not. As legal phenomena, however, both kinds of rights are regularly direct individual rights that protect individual interests. As such, both kinds of rights transcend the reciprocal paradigm of international law.[158] The fact that investor rights are also supposed to further the flow of foreign investment does not change the fact that the protection of the individual's interest in the autonomous enjoyment of property is central to the idea of direct investor rights. As a result, considerations regarding one set of rights that are based on its non-reciprocal character can legitimately inform considerations regarding the other set of rights as far as its non-reciprocal character is concerned.

III. Implications of the Comparability between Investor Rights and Human Rights

Because of the multilateral nature of human rights treaties, termination under Article 54 (b) VCLT is considerably less likely than in the largely bilateral world of investment treaty law. It seems almost impossible that all contracting states would agree to jointly terminate an international human rights treaty. However, whether or not treaties that establish direct international individual rights remain, in their fundamental structure, entirely dependent upon joint state will or whether they develop some normative force against the latter has profound implications for the theory of international law.

A case in point is the discourse of the constitutionalization of international law.[159] This discourse regularly relies on international legal norms that are beyond the reach

[156] *Tomuschat*, ZaöRV 45 (1985), 547, 550.

[157] Cf also the reasons referred to by *Hathaway*, The University of Chicago Law Review 72 (2005), 469, 474.

[158] Cf also *Schill*, in: Bungenberg/Griebel/Hobe/Reinisch (eds), International Investment Law, 1817, 1835.

[159] For an overview, see *Peters*, in: Gibbons (ed), The Encyclopedia of Political Thought, 1484–1487; *Paulus*, in: Dunoff/Trachtmann (eds), Ruling the World?, 69–109; specifically for international investment law, *Behrens*, Archiv des Völkerrechts 45 (2) (2007), 153-179; *Schill*, The Multilaterlization of International Investment Law, 372-378; *Braun*, Ausprägungen der Global-

of the willful acts of states.[160] Next to elements of hierarchy in international law, the theory focuses on the existence and emergence of certain core legal principles that exist as objective law beyond state control and on central or de-centralized mechanisms to sanction violations of these principles.[161] Within this discourse, it is a common argumentative feature to identify the protection of the individual or humanity rather than sovereign will as the ordering paradigm of international law.[162] States are responsible for the protection of individual rights and the pursuit of public interests within the overarching framework of the international constitution. They are agents of the international rule of law that fulfill a serving function rather than creators of that rule.[163] The establishment of human rights in international treaties is not an act by which "*states actually define, delimit, and contain those rights, thereby domesticating their use and affirming the authority of the state as the source from which such rights spring*".[164] Rather, it is the other way round. States are the ones that have been domesticated.

This article is not the place to discuss the merits of this theory,[165] but it is easy to see how the theory cannot be indifferent to the question of whether states remain unconditionally able to abrogate individual rights by joint state action. The notion that such action is conditional upon certain legal requirements and that it is thus impossible for states to abrogate international individual rights by simple *fiat* would not only be consistent with claims of constitutionalization, but would also support these claims. As soon as there is some legal condition connected to the revocation of individual rights by concerted state action – be it in the form of a non-derogable general principle of law that protects individuals against arbitrary joint state action or in the form of specialized rules of state responsibility (see above, p 19 et seq) – the individual effectively enjoys an international right not to be arbitrarily deprived of international rights.

In this respect, the treatment of the mutual revocation of survival clauses by investment tribunals tells a story about the state of international individual rights that in the field of human rights law would probably remain untold. The revocation of survival clauses in BITs provides the opportunity for contemplating the state of direct international individual rights in the face of concerted state action. Tribunals that consistently find along the lines of *Eastern Sugar* and *Walter Bau* will change the structure of international law. Any theory of international law – not only the constitutionalization discourse – would have to relate to such a development.

isierung, 266-281; with a critical thrust, *Schneiderman*, Constitutionalizing Economic Globalization.

160 *Paulus*, ZaöRV 67 (2007), 695, 700.

161 *Ibid.*

162 *Peters*, EJIL 20 (3) (2009), 513–544.

163 *Walker*, Intimations of Global Law, 64 et seq, 91 et seq with further references.

164 *Koskenniemi*, HJIL 32 (2) (1991), 397, 406.

165 On the critique generally *Peters*, in: Gibbons (ed), The Encyclopedia of Political Thought, 1484, 1486–1487.; in detail, *Möllers*, The Three Branches, 230; *von Bogdandy*, HILJ 47 (2006), 223–242; *Grimm*, in: Dobner/Loughlin (ed), The Twilight of Constitutionalism (2010), 3–23.

F. Conclusion

In conclusion, it can be said that while both infringement proceedings and preliminary reference procedures oblige member states to comply with their EU law obligations, they do not render intra-EU BITs invalid *ipso facto*. Intra-EU BITs must still be terminated by the member states in order to lose legal effect. Tribunals established on the basis of intra-EU BITs will be bound by the CJEU's determinations as to the content of EU law. It is, however, ultimately up to tribunals to determine whether there is indeed incompatibility or conflict between a specific BIT and EU law in a specific case. Should a tribunal see a conflict between EU law and an intra-EU BIT, it must decide whether it applies the VCLT's rules of conflict in Article 59 I and 30 III or Article 27 VCLT. The latter is more in line with the CJEU's own understanding of EU law.

A termination agreement and the revocation of a survival clause might well be illegal under the VCLT, but under the ARSIWA there is no remedy for investors. This shows that while international individual rights might have been established in BITs and are no longer subject to the interests of the investor's home state, they remain subject to concerted state interest. Contrary to this finding under the VCLT and ARSIWA, the awards in *Eastern Sugar* and *Walter Bau* hold the contracting states to the terms of the survival clause, even though a later treaty has abrogated it. An attempt to reconstruct doctrinal reasons for the awards entails seeing them as the expression of an emerging specific rule of state responsibility in investment arbitration or as a general principle of law protecting international individual rights against certain matters of concerted state action.

If tribunals consistently find along the lines of the tribunals in *Eastern Sugar* and *Walter Bau*, they will effectively establish an international right of investors not to be arbitrarily deprived of international rights by concerted state action. Since investor rights and human rights as legal phenomena are structurally comparable – notwithstanding notable differences – such development will have implications for the general state of international individual rights. Since in human rights law this question remains largely hypothetical, the revocation of survival clauses in BITs currently provides the opportunity to use international investment law as a laboratory for observing the general state of direct international individual rights in the face of concerted state action.

At this point, all of the above concerns the hypothetical case of a CJEU judgment that declares intra-EU BITs incompatible with EU law and the hypothetical case of an intra-EU investment dispute initiated on the basis of a consensually terminated BIT. While both events will mark the twilight of intra-EU BITs, within this twilight the state of international individual rights will emerge in an unusually clear way.

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